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## I. THE CORONERS AND JUSTICE ACT 2009 AND INTERNATIONAL CRIMINAL LAW: BACKING INTO THE FUTURE?

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# CURRENT DEVELOPMENTS

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- III. The Making and Unmaking of the Copenhagen Accord**

### I. THE CORONERS AND JUSTICE ACT 2009 AND INTERNATIONAL CRIMINAL LAW: BACKING INTO THE FUTURE?

#### *A. Introduction*

As a precursor to the United Kingdom's ratification of the Rome Statute of the International Criminal Court (ICC)<sup>1</sup> in 2001, the respective Parliaments in the UK adopted two Acts to implement the obligations that treaty imposed on the UK, and to implement the international crimes, as defined in that treaty, into the law of the UK.<sup>2</sup> When the International Criminal Court Act (ICC Act) was being debated in 2001, Baroness Scotland, speaking for the Government, explained that part of the *raison d'être* of the Act was that the UK ought not to be seen as a safe haven for international criminals.<sup>3</sup> However, in line with article 11 of the Rome Statute, the jurisdiction of UK courts over such offences, insofar as they were not already covered by the Geneva Conventions Act 1957 and the Genocide Act 1969 (the latter of which was repealed by the ICC Act)<sup>4</sup> only applied prospectively.

Unfortunately international criminality did not begin in 2001, and there were a number of reported instances of alleged international criminals living in the United Kingdom. Those reports concentrated primarily on individuals from the former Yugoslavia and Rwanda,<sup>5</sup> both of which, of course, have international tribunals

<sup>1</sup> 2187 UNTS 90.

<sup>2</sup> International Criminal Court Act 2001 c.17, International Criminal Court (Scotland) Act 2001, 2001 ASP 13. On the legislation for England and Wales see, eg, R Cryer and O Bekou, 'The Core Crimes and ICC Cooperation in England and Wales' (2007) 5 *Journal of International Criminal Justice* 441; R Cryer, 'Implementation of the International Criminal Court Statute in England and Wales' (2002) 51 *ICLQ* 733.

<sup>3</sup> *Hansard* HL vol 623 cols 418–419 (2001) speaking of the Scottish Legislation on point. A sentiment expressly reiterated in the context of the debate on this item in 2009, *Hansard* HL vol 713 col 1065 (26 October 2009) (Lord Carlile); col 1071 (Lord Bach, for the Government).

<sup>4</sup> S 83 of the ICC Act.

<sup>5</sup> *Hansard* HL vol 713 col 1068 (26 October 2009) (Lord Hannay). See also A Fallon, 'Man arrested in UK suspected of war crimes in Croatia' *The Guardian* (London, England, 3 April 2010).

dealing with international crimes committed there. The United Kingdom voted for the creation of both tribunals, but those tribunals are now coming to the end of their mandate, and there are a number of suspects who will not be tried before them. This is sometimes because the Tribunals have referred the cases back to national courts, but in other cases, because the international tribunals have not considered the cases to be sufficiently important to issue indictments and invoke their primary jurisdiction over them. Such persons may, nonetheless, still be fully worthy of prosecution, and, in some circumstances it has proved impossible to extradite suspects, especially to Rwanda, on the basis that they may not receive fair trials there.<sup>6</sup> As a result something needed to be done, as a number of NGOs, and others, had noted.<sup>7</sup> In other words, it proved necessary for the United Kingdom to provide for a statutory basis for UK courts to prosecute international crimes committed prior to 2001 which were not already covered by other legislation.<sup>8</sup> The opportunity to do this was taken in the Coroners and Justice Act 2009, which received Royal Assent on 12 November 2009.<sup>9</sup> The relevant section (section 70)<sup>10</sup> is rather complex, and raises three particular issues: the question of retrospectivity, sentencing, and the controversial issue of the definition of residence. It is the purpose of this piece to explain those three matters. It ought to be noted at the outset that these issues are interlinked, and have to be understood together.

### B. Backdating Jurisdiction

Section 70 of the Coroners and Justice Act backdates the relevant provisions of the International Criminal Court Act 2001 to 1 January 1991. Therefore it is necessary to briefly set out the relevant sections of that Act. The relevant provisions for our purposes are sections 51, 52 and 65.<sup>11</sup> Section 51 creates the offences of genocide, crimes against humanity and war crimes in the law of England and Wales. Section 52 applies general principles of liability to those offences. Interestingly, with one exception (section 65), the ICC Act applies the principles of liability from the law of England and Wales rather than the Rome Statute. The two are not identical, but it appears that the Government's view was that they are sufficiently similar to make the approach robust from the point of view of complementarity. Section 65 introduces command/superior responsibility (as defined in article 28 of the Rome Statute) into domestic law, as the UK does not have an analogous domestic principle of liability.

<sup>6</sup> *Brown et al v The Government of Rwanda and the Secretary of State for the Home Department* [2009] EWHC 770.

<sup>7</sup> The Aegis Trust, in particular, had a crucial role in bringing the matter forward, see Lord Carlile, *Hansard* HL vol 713 col 1065 (26 October 2009). Redress, JUSTICE and African Rights also played important roles (col 1067 (Baroness D'Souza)). In the interests of full disclosure, one of the authors (Robert Cryer) ought to disclose that he was consulted by the Aegis Trust about their proposals.

<sup>8</sup> There may be an argument that customary international law, being in many instances directly pleadable before UK courts, could provide the basis for prosecution for war crimes without a statute. This route to criminalization in the UK legal order was just about left open by the House of Lords in *R v Jones et al* [2006] UKHL 16, but probably was not robust enough to guarantee that appropriate action could be taken.

<sup>9</sup> The relevant provisions of the Act came into force on 6 April 2010.

<sup>10</sup> Which apply to England and Wales, and, *mutatis mutandis*, Northern Ireland.

<sup>11</sup> Ss 58 and 59, which are similarly amended to ss 51 and 52, are the equivalent for Northern Ireland.

Section 70 of the Coroners and Justice Act adds in a section 65A to the ICC Act, which, in a spirit of candour, provides for the 'retrospective application' of the relevant offences and principles of liability.<sup>12</sup> This raises two issues, first, the question of why 1991 was chosen; and second, more generally, the question of the lawfulness of the retrospective application of (international) criminal law.

### 1. The date

There were many possible dates to which the various forms of international criminality could have been domestically criminalized, the Genocide Convention, for example, 'confirmed' that it was a crime in 1948,<sup>13</sup> and serious violations of the laws and customs of war have been considered war crimes since long before.<sup>14</sup> The Government decided, however, despite suggestions that they should go back further, to set the start of 1991 as the cut-off date for retrospectively applying the crimes in the ICC Act. When explaining the choice of the date, Lord Bach explained that:

The date is pivotal in the development of international law. It is the date from which the International Criminal Tribunal for the former Yugoslavia had jurisdiction to prosecute these three types of crime. It allows us to adopt the same date for all three areas, and it is not too far back to make successful prosecution impractical.<sup>15</sup>

In some ways this is true. The creation of the ICTY was a watershed in international criminal law, the discipline would not have undergone the renaissance it has in the past decade and a half were it not for the creation of that Tribunal. On the other hand, there may well be other international criminals living, or resident for the relevant purposes, in the UK, whose crimes were committed before 1991, who also merit prosecution. In addition, there is no necessary reason why the same date needs to be adopted for all three offences. For example, the Geneva Conventions Act came into force in 1957, the Genocide Act in 1969, but this was not considered to be a major problem.<sup>16</sup> On the practical point Lord Bach raised, as the *Sawoniuk* case showed, prosecution can occur, and defensibly, after considerably more than forty years.<sup>17</sup>

The changes in the law brought about by the Coroners and Justice Act have to be seen in the round though, and it cannot be forgotten that the Act applies not only to crimes committed in England, Wales and Northern Ireland, but also to those committed by nationals and residents, including, owing to sections 68(1) and (2) of the ICC Act, those who have become resident after commission of the relevant offence. It may, or may not, be the case that there are UK nationals who are responsible for international crimes prior to 1991. However, whatever the likelihood of retrospective jurisdiction before 1991 causing embarrassment for the UK, since the Act applies to all residents, the possibility of engaging in investigations of offences prior to 1991 by such persons, proved too much for the Government to commit to. Hence that date proved to be a compromise to which the Act gives expression.

<sup>12</sup> Section title and s 65A(1).

<sup>13</sup> Genocide Convention, art I. 78 UNTS 277.

<sup>14</sup> Judgment of the International Military Tribunal for the Trial of Major German War Criminals (London: HMSO, 1947) vol 22, 467.

<sup>15</sup> HL vol 713, col 1070 (26 October 2009) (Lord Bach).

<sup>16</sup> Of course, it is true, though, that less attention was paid to international criminal law at the time.

<sup>17</sup> *R v Sawoniuk* (2001) 2 Cr App R. 220.

## 2. Retrospectivity

The retrospective application of the ICC Act is, however, subject to an important limitation. This is contained in section 65A(2) of the (amended) ICC Act, which provides that:

[T]hose sections do not apply to a crime against humanity, or a war crime within article 8.2(b) or (e), committed by a person before 1 September 2001 unless, at the time the act constituting that crime was committed, the act amounted in the circumstances to a criminal offence under international law.

The retrospective creation of liability for international crimes is not unknown in the United Kingdom. Most notably, the War Crimes Act 1991 retrospectively granted UK courts jurisdiction over killings in violation of international law committed in World War II. Admittedly, that Act provoked, if not a constitutional crisis, a full and frank debate on the appropriateness of retrospectivity between the House of Commons and the House of Lords.<sup>18</sup> Of course, the retrospective creation of criminal offences is usually considered to violate the *nullum crimen sine lege* principle enshrined in, inter alia, article 7 of the European Convention on Human Rights (ECHR).<sup>19</sup> The first limb of article 7(1) provides that 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute an offence under national or international law at the time when it was committed.'<sup>20</sup> As article 7(1) makes clear though, a valid conviction can be entered if there was a criminal prohibition in either international or domestic law at the time of the relevant conduct. As a result, it does not violate article 7 to create retrospectively in domestic law international crimes, so long as they were in existence at the time of the relevant conduct.<sup>21</sup> If the conduct was directly criminalized by international law,<sup>22</sup> then putative defendants were already under that prohibition at the time, so it is not impermissible to later grant domestic courts jurisdiction to prosecute those offences, which is what section 65A does.

The difficulty came about though, owing to the fact that the ICC Act adopted the Rome Statute's definitions of war crimes and crimes against humanity. Genocide was not really an issue, since the Rome Statute essentially uses the definition originally adopted in article II of the Genocide Convention 1949.<sup>23</sup> However, what amounts to a war crime, and the precise definition of crimes against humanity, are more complex

<sup>18</sup> See G Ganz, 'The War Crimes Act 1991—Why No Constitutional Crisis?' (1992) 55 Modern Law Review 87; AT Richardson, 'War Crimes Act 1991' (1992) 55 Modern Law Review 73; C Greenwood, 'The War Crimes Act 1991' in H Fox and MA Meyer (eds), *Armed Conflict and the New Law: Effecting Compliance* (London, BIICL, 1993) 215.

<sup>19</sup> 213 UNTS 221.

<sup>20</sup> Emphasis added. See generally on article 7 ECHR, DJ Harris, M O'Boyle, EP Bates and CM Buckley, *Harris, O'Boyle and Warbrick, Law of the European Convention on Human Rights* (2<sup>nd</sup> edn., OUP, Oxford, 2009) ch 7.

<sup>21</sup> Indeed, when the European Court of Human Rights has dealt with article 7 in this context it has, it must be said, been remarkably generous to States prosecuting international crimes. In *Jorgić v Germany* the Court was prepared to accept that a prosecution for genocide, on the basis of an incorrect (and broader) interpretation of the scope of the crime than international law provided for could be defended against challenge on article 7 grounds: *Jorgić v Germany* [2007] ECHR 583 (12 July 2007), paras 89–116. For the most recent pronouncement on article 7 by the Grand Chamber see *Kononov v Latvia* [2010] ECHR 667 (17 May 2010).

<sup>22</sup> See, eg, R Cryer, H Friman, D Robinson and E Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2<sup>nd</sup> edn., CUP, Cambridge, 2010) 8.

<sup>23</sup> *Hansard* HL vol 713 col 1070 (26 October 2009) (Lord Bach).

matters, particularly going back to 1991.<sup>24</sup> Although for many war crimes the question is not too difficult, as Lord Bach explained:

The position in the other areas is less straightforward. While the vast majority of offences were recognised as criminal in international law by 1991, a small number may have been recognised at that time in a narrower form than appears in the 2001 Act, and a very small number may not have been sufficiently recognised at all in 1991. Indeed, international law naturally developed over the period in question, and it is important that our clauses cater for this to ensure the maximum possible coverage for that period—1991 to 2001. We have therefore developed a hybrid approach providing absolute certainty where possible, but elsewhere including a requirement that the relevant conduct amounted in the circumstances at the time to an offence under international law.<sup>25</sup>

This is the reason that section 65A(2) expressly refers to crimes against humanity and the war crimes in articles 8(2)(b) and (e). Those aspects of article 8 refer to the war crimes in the Rome Statute which are not referable to grave breaches of the Geneva Conventions of violations of common article 3. These were assumedly considered uncontroversial by the Government.<sup>26</sup>

‘An offence under international law’ is a phrase that needs some unpacking. It cannot mean the Rome Statute per se, as the Statute did not come into force until 2002. It may be taken to mean applicable treaties (Additional Protocol I would be an example—but one covered by the Geneva Conventions Act since 1995),<sup>27</sup> but the primary referent is probably customary international law. In determining the content of that law, courts are likely to be able to derive considerable guidance from the jurisprudence, in particular of the ICTY (and ICTR). Their reliance on such evidence of customary international law is bolstered by section 50(5) of the ICC Act. This provides that ‘the court shall take into account any relevant judgment or decision of the ICC. Account may also be taken of any other relevant international jurisprudence’.<sup>28</sup> Indeed, one pragmatic reason to argue for the starting date of 1991 is to facilitate reference to the ICTY’s jurisprudence (and the practice it contains) on what customary international law said at that time.<sup>29</sup> The importance, for example, of the *Tadić* interlocutory Appeal ought not be underestimated, even 15 years on.<sup>30</sup> Going back further than this would require a more difficult search for evidence of international law at the relevant time.

That is not to say that this is the end of the matter. The ICTY, has not, dealt with the matter of child soldiers, and it is probably fair to say that (small) aspects of the definitions of crimes in the Rome Statute are broader than those that were accepted in

<sup>24</sup> *ibid.*

<sup>25</sup> *ibid.*

<sup>26</sup> That the criminality of violations of common article 3 can be considered uncontroversial as far back as 1991 might be questioned by some, but there is good evidence now that this was the case (see note 30). Grave Breaches of the Geneva Conventions perpetrated anywhere have been crimes in UK law since 1957, so raised no issue here.

<sup>27</sup> Geneva Conventions (Amendment) Act 1995, ch 27.

<sup>28</sup> On the relations between the various influences that domestic courts may rely upon see R Cryer, ‘Neither Here nor There? The Status of International Criminal Jurisprudence in the International and UK Legal Orders’ in M Bohlander and K Kaikobad (eds) *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (Brill, The Hague, 2009) 183.

<sup>29</sup> Although, strictly, the ICTY determines the content of custom at the time of the conduct, not the start-date of its jurisdiction.

<sup>30</sup> *Prosecutor v Tadić*, IT-94-1-AR72, 2 October 1995.

1991. For example, the *Norman* decision of the Special Court for Sierra Leone determined, by a majority, that the crime of recruiting child soldiers existed by 1996 (not 1991),<sup>31</sup> and Judge Robertson, in dissent, said that the custom only crystallized in 1998, with the negotiation of the Rome Statute.<sup>32</sup>

Where a defendant successfully shows that the Rome Statute norm was broader than international law applicable at the time of the relevant conduct, it would normally mean that a conviction would violate article 7 of the ECHR. However a defendant can still be convicted if the relevant conduct satisfied the narrower prohibition that international law contained at the time.<sup>33</sup> This is not problematic from the point of article 7, as the conduct would still satisfy the requirement that it was criminalized in international law at the time. It is also interesting, in that the conduct of the defendant will have to be measured, not against the standards set directly in the Statute, but those in (usually customary) international law. The Act, in these circumstances, essentially requires the courts to directly apply international law in this area.

A similar comment may be made with respect to section 65A(5). That section applies the general principles of liability applicable in the law of England and Wales to international crimes back to 1991. There could be a problem with doing so, to the extent that principles of liability may differ from those in general international law at the time, hence the requirement that the conduct was criminal in international law. Since command responsibility is also backdated to 1991 by section 65(7), the same requirement (that the conduct was criminal in international law at the time) is imposed. This could raise some interesting issues, in particular as the ICTY has held that the *mens rea* for command responsibility in custom is narrower than that for military commanders in the Rome Statute.<sup>34</sup>

### 3. Sentencing

As noted above, Genocide and Grave Breaches of the Geneva Conventions have been offences in the law of England and Wales since they were criminalized by the Genocide Act 1969 and the Geneva Conventions Act 1957 respectively. A conviction for an offence under either Act carried with it a maximum term of 14 years' imprisonment, unless murder was involved, when the sentence was life imprisonment. The ICC Act increased the maximum penalty available in domestic law for such offences

<sup>31</sup> *Prosecutor v Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) SCSL-2004-14-AR72-E, 31 May 2004. See M Happold, 'International Humanitarian Law, War Criminality and Child Recruitment' (2005) 18 *Leiden Journal of International Law* 283. There are also aspects of the definitions of crimes in the Rome Statute that are narrower than general international law permits (see eg, R Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP, Cambridge, 2005) ch 5; A Cassese, *International Criminal Law* (2<sup>nd</sup> edn., OUP, Oxford, 2008) 124–126) these, on the other hand, do not raise a retrospectivity issue, rather than an impunity one.

<sup>32</sup> *ibid*, Dissent of Judge Robertson.

<sup>33</sup> Explanatory notes for the Coroners and Justice Act, para 400. If it did not fulfill this requirement, then a UK court would be open to challenge under section 6 of the Human Rights Act when convicting someone of the relevant offence.

<sup>34</sup> *Prosecutor v Delalić, Mucić, Delić and Landžo*, Judgment, IT-96-21-A, 20 February 2001, paras 216–241; *Prosecutor v Bemba Gombo*, Decision Pursuant to art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo IC-01/05-01/08, 15 June 2009, paras 432–434.



committed after 1 September 2001 to 30 years,<sup>35</sup> if the offence did not involve murder.<sup>36</sup> Section 70(3) of the Coroners and Justice Act modifies the maximum penalties which are applicable to both genocide and war crimes committed in international armed conflict perpetrated during the period of retrospection by inserting section 65B into the ICC Act. This provision provides that any pre-existing offence of genocide or war crime committed in international armed conflict perpetrated between 1 January 1991 and 1 September 2001 shall be punishable by a maximum of 14 years' imprisonment. The reduction of the penalty during that period was introduced in order to ensure compliance with article 7(1) of the ECHR,<sup>37</sup> which states in its second limb that 'a heavier penalty [shall not] be imposed than the one that was applicable at the time the criminal offence was committed'.

Section 65B is only applicable to pre-existing international offences in the criminal law of England and Wales. The term pre-existing offences is defined by section 65B(5) as conduct criminalized by the ICC Act which, at the time of its commission, also amounted to an offence under the Genocide Act or the Geneva Conventions Act. It is clear that crimes against humanity and war crimes which do not constitute grave breaches of the Geneva Conventions will not be recognized as pre-existing offences, and any conviction for these offences committed during the period of retrospection will be subject to the 30 years' maximum penalty. Not all acts of genocide will, however, satisfy the meaning of pre-existing offences contained in section 65B(5). Although genocide was criminalized in domestic law by the Genocide Act,<sup>38</sup> it is worth noting that extraterritorial conduct amounting to genocide was (probably) not an offence in the law of England and Wales prior to 2001 when the ICC Act entered into force. Section 65B would thus not apply to such acts of genocide and a conviction for these crimes committed during the period of retrospection will be likely to be subject to the 30 years' maximum term of imprisonment.

The limited application of section 65B in relation to conduct amounting to genocide or a grave breach of the Geneva Conventions between 1991 and 2001 is unlikely to breach the European Convention. Since article 7(1) permits the retroactive conviction of conduct that is criminalized by international law, it ought to follow that the penalties that may be imposed are those international law provides for. The jurisprudence of the European Court of Human Rights has interpreted the second limb of article 7(1) to impose qualitative requirements of both accessibility and foreseeability.<sup>39</sup> In this regard, article 7(1) requires that penalties must be clearly defined by law and that an individual must be able to determine what penalty will be imposed for their criminal acts.<sup>40</sup> Customary international law permits States to impose sentences up to and including the death penalty for international crimes.<sup>41</sup> As such, it is unlikely that an international criminal could claim that a severe sentence was

<sup>35</sup> S 70 (2) of the ICC Act.

<sup>36</sup> S 53(6). Under s 53(5) of the ICC Act a conviction for primary or secondary liability for murder results in a mandatory life sentence. These have been amended now by s 70(2), which inserts s 1A into the Geneva Conventions Act.

<sup>37</sup> *Hansard* HL vol 713 col 1071 (26 October 2009) (Lord Bach).

<sup>38</sup> S 1 of the Genocide Act.

<sup>39</sup> *Kononov v Latvia* [2010] ECHR 667 (17 May 2010), para 185.

<sup>40</sup> *Kafkaris v Cyprus* [2008] ECHR 143 (12 February 2008), para 140.

<sup>41</sup> *Klinge*, III LRTWC 1, 3. Of course, for many (perhaps most) States, the death penalty is unlawful for other reasons.

unforeseeable.<sup>42</sup> Similarly, it might be doubted that the limitations in the Coroners and Justice Act were entirely necessary, since international law already directly applied more severe penalties to such offences. Nonetheless, the Act has taken a 'belt and braces' approach, which may be overly lenient on point.

### C. The Concept of 'Residency'

In addition to international crimes committed in England and Wales,<sup>43</sup> the ICC Act granted national courts jurisdiction over UK nationals.<sup>44</sup> Section 68(1) of the ICC Act asserts jurisdiction over crimes committed elsewhere by non-nationals against other non-nationals subject to the limitation that the alleged offender is, or subsequently becomes, a resident of the United Kingdom.<sup>45</sup> The definition of residency is contained in section 67(2) of the ICC Act. It explains, in a somewhat unhelpful fashion, that 'a "United Kingdom resident" means a person who is resident in the United Kingdom'. When the Government was considering whether to amend the retrospective application of the ICC Act, it acknowledged that there was a lack of clarity in the legislation as to what the term actually meant and was therefore willing to 'explore the possibility of providing more certainty as to who may or may not be considered to be a UK resident'.<sup>46</sup>

Calls were made to the Government to go further than providing statutory guidance on the meaning of the term. Some sought to replace the test of residence with one of presence.<sup>47</sup> The Government was not receptive to that idea. It took the view that the existing legal framework did not provide a safe haven to those who visited the United Kingdom on the basis that staying for any length of time carried with it the possibility of falling within the meaning of a UK resident and therefore liable to prosecution under the ICC Act.<sup>48</sup> In addition, the Government was keen to stress its reluctance to assert any jurisdictional competence over individuals who had no connection with the United Kingdom other than being temporarily present in its territory.<sup>49</sup> On this matter it stated that: 'Any exercise of universal jurisdiction carries with it a risk of infringing the sovereignty of another State, and is not something that the UK does lightly. In general, we would only do so when required to by an international convention or agreement'.<sup>50</sup>

In both justifying and maintaining the distinction between the residency requirement contained in the ICC Act with the presence requirement contained in other national legislation which asserts universal jurisdiction, the Government noted that the

<sup>42</sup> *Prosecutor v Delalić, Mucić, Delić and Landžo*, Judgment, IT-96-21-T, 16 November 1998, para 817.

<sup>44</sup> Including those under UK service jurisdiction, *ibid.*

<sup>46</sup> *Hansard* HL vol 712 col 660 (7 July 2009) (Lord Bach).

<sup>47</sup> See the Joint Committee on Human Rights, *Closing the Impunity Gap: UK Law on Genocide (and Related Crimes) and Redress for Torture Victims*, Twenty-fourth Report of Session 2008-09, HL Paper 153/HC 533, para 51, and the recommendations made by several of the memoranda submitted in evidence (JCHR). See, also, *Hansard* HL vol 712 cols 655-658 (7 July 2009) (Lords Carlile, Falconer, Hannay, and Elystan-Morgan).

<sup>48</sup> Memorandum submitted by the Ministry of Justice to the JCHR, para 13.

<sup>49</sup> *Hansard* HL vol 712 col 660 (7 July 2009) (Lord Bach).

<sup>50</sup> Memorandum submitted by the Ministry of Justice to the JCHR, para 10.

establishment of jurisdiction by the latter was expressly required by treaties which the UK was party to.<sup>51</sup> In contrast, there is no such requirement in the Rome Statute.<sup>52</sup> It is true that the Rome Statute does not require States to domestically criminalize international crimes and prescribe regulatory competence over this conduct under the universal principle.<sup>53</sup> On the other hand, the ICC Act recognizes the lawfulness of the assertion of universal jurisdiction over these offences, without the requirement of presence.<sup>54</sup> Nonetheless, the Coroners and Justice Act maintains the residency requirement included in the ICC Act. However in response to the critiques of that Act, the Coroners and Justice Act clarifies what residence means in this context in two ways.<sup>55</sup> First, section 67A(1) lists specific categories of persons who are to be automatically treated as UK residents for the purposes of the ICC Act. Although the Government rejected the idea of introducing a presence requirement into the ICC Act, part of the reform contained in the Coroners and Justice Act allows for prosecutions to be brought against certain individuals from the moment when they first arrive in the United Kingdom. Second, section 67A(2) details a number of factors that the courts are to take into consideration when determining whether an individual is to be treated as a UK resident under the ICC Act.

Section 67A(1) deems certain people to be UK residents when this would not otherwise be the case. The first category to be treated as UK residents by the ICC Act are those who have applied for indefinite leave to remain in the UK, or those who have been granted indefinite leave to remain.<sup>56</sup> In both instances the only requirement is that the individual is present in England or Wales in order to be considered a resident, and it is immaterial whether the person's application has been rejected or is yet to be determined.

The second category provided for are individuals who have leave to enter or remain in the United Kingdom for the purposes of work or study. Again, there is a requirement that the individual is present in the United Kingdom. Although the Government had previously stated that students from abroad would not fall within the meaning of a UK resident,<sup>57</sup> the provision only covers those who have specifically been granted leave to enter or remain in the United Kingdom. A particular group not covered by this category are visiting armed forces who do not require such leave to receive military training in the United Kingdom.<sup>58</sup>

The next category deals with applications for asylum and human rights claims. Similar to requests for indefinite leave to remain in the United Kingdom, individuals who have been granted asylum or been successful in their human rights claim are to be treated as UK residents.<sup>59</sup> Moreover, so long as the individual is present in the

<sup>51</sup> *ibid.* These include the Geneva Conventions of 1949, the International Convention against the Taking of Hostages 1979, and the Convention against Torture 1984.

<sup>52</sup> *ibid.*

<sup>53</sup> cf J Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *Journal of International Criminal Justice* 86, 91.

<sup>54</sup> S 72, which disapplies the jurisdictional aspects of the dual criminality rule for crimes in the ICC Act, implicitly accepting that other States may lawfully use broader jurisdictional claims than the UK for such offences.

<sup>55</sup> S 70(4) of the Coroners and Justice Act 2009.

<sup>56</sup> Ss 67A(1)(a) and (b).

<sup>57</sup> Memorandum submitted by the Ministry of Justice to the JCHR, para 12.

<sup>58</sup> *Hansard* HL vol 713 col 1073 (26 October 2009) (Lord Bach).

<sup>59</sup> S 67A(1)(d).

United Kingdom, this will be the case regardless of whether their claim has been rejected or is yet to be determined.<sup>60</sup> Dependents of individuals who make an application for indefinite leave to remain, an asylum claim, or a human rights claim, are to be treated as residents in instances when an application or claim has been granted,<sup>61</sup> or when a dependent is present in the United Kingdom, and irrespective of whether the application or claim is yet to be determined.<sup>62</sup>

The fourth category provides that individuals who cannot be removed or deported from the United Kingdom by virtue of obligations imposed by the ECHR, or for some other practical reason, are to be treated as UK residents.<sup>63</sup> The next named category is concerned with individuals who are to be deported under the Immigration Act 1971 on the grounds that doing so is conducive to the public good. It provides that individuals against whom such a deportation order has been made are to be treated as UK residents,<sup>64</sup> as are those who are present in the United Kingdom and have appealed their order regardless of whether the appeal is yet to be determined.<sup>65</sup> The penultimate set of persons are individuals who are illegal entrants within the meaning laid down in the Immigration Act 1971, as well as those who are liable to be removed under section 10 of the Immigration and Asylum Act 1999.<sup>66</sup> Finally, individuals who are detained in lawful custody, as defined in section 67A(3), are to be treated as UK residents for the purposes of the ICC Act.<sup>67</sup>

The recognition that individuals who cannot be removed or deported from the United Kingdom are to be deemed as residents by the ICC Act is significant. Article 1F(a) of the Refugee Convention 1951 provides that refugee status cannot be claimed where there are serious reasons for considering that an individual has committed crimes against peace, war crimes or crimes against humanity.<sup>68</sup> According to the *travaux préparatoires*, one of the purposes of article 1F(a) is to ensure that offenders who commit these serious crimes do not travel abroad to escape the prospect of criminal prosecutions being brought against them in their home State.<sup>69</sup>

Ordinarily the UK would grant humanitarian protection to asylum seekers denied of refugee status where substantial grounds have been shown that they face a real risk of suffering serious harm if returned.<sup>70</sup> However, the Immigration Rules expressly exclude asylum seekers falling within article 1F(a) from being granted humanitarian protection.<sup>71</sup> Although such asylum seekers may not remain in the UK on either refugee or humanitarian grounds, they still enjoy rights under the ECHR and cannot be removed in instances where they face a real risk of being exposed to treatment prohibited by article 3 of the Convention.<sup>72</sup> Article 1F(a) asylum seekers, like all other individuals who cannot be removed or deported from the United Kingdom, now fall

<sup>60</sup> S 67A(1)(e).

<sup>61</sup> S 67A(1)(f)(i). The subsection requires that the dependent is actually named in the application or claim.

<sup>62</sup> S 67A(1)(f)(ii).

<sup>63</sup> S 67A(1)(g).

<sup>64</sup> S 67A(1)(h)(i).

<sup>65</sup> Ss 67A(1)(h)(ii) and (iii).

<sup>66</sup> S 67A(1)(i).

<sup>67</sup> S 67A(1)(j).

<sup>68</sup> Although art 1F(a) does not list genocide as a separate crime, the conduct nonetheless falls within the meaning of crimes against humanity and is thereby covered by the provision: *Prosecutor v Kayishema and Ruzindana*, Judgment, ICTR-95-1-T, 21 May 1999, para 89.

<sup>69</sup> *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 24th Meeting*, UN doc. A/CONF.2/SR.24.

<sup>70</sup> Immigration Rule 339C.

<sup>71</sup> Immigration Rule 339D(i).

<sup>72</sup> *Gurung v Secretary of State for the Home Department* [2002] UKIAT 04870.

within the categories provided by sections 67A(1)(e) and (g), and are therefore liable to face criminal prosecutions under the ICC Act from the moment when they first arrive in the United Kingdom and not after an arbitrary period of time that they have remained in order to be deemed as UK residents.<sup>73</sup>

In addition to the list of categories specifically detailing the instances when certain individuals are to be treated as UK residents, the Coroners and Justice Act provides a number of non-exhaustive factors that the courts are to take into account when determining the issue of residency. Although the determination of whether an individual has become a UK resident is still to remain a question of fact and degree for the courts to decide in each case, the newly inserted section 67A(2) into the ICC Act provides that the courts are to have regard to the following guiding factors: the periods during which the individual has been or intends to be in the UK; the purposes for which the individual is, has been or intends to be in the UK; whether the individual has family or other connections to the UK, and the nature of those connections; and whether the individual has an interest in residential property located in the UK.<sup>74</sup> Although these guiding factors are likely to be of great assistance to the courts, the fact remains that the concept of residency is not completely determinate.

#### D. Conclusion

Generally, the amendments to the ICC Act brought in by the Coroners and Justice Act ought to be seen as welcome developments. Without introducing some form of retrospectivity, the possibility of the United Kingdom being seen as a safe haven for international criminals was there, as reports of alleged perpetrators have clearly shown.<sup>75</sup> The retrospectivity issue has been handled sensitively, albeit in a manner which may require courts to enter difficult customary waters at times. Although the Government could not be persuaded to include a presence, rather than residence test, the clarification of the term is helpful, although far from perfect. Perhaps the largest disappointment is that, in spite of these changes, there is still no specialist war crimes unit in the Metropolitan Police. This would be an important development in ensuring that substance, procedure and practice cohered, but the Government would not move on that point.<sup>76</sup>

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<sup>73</sup> The War Crimes Unit in the UK Border Agency investigated 1863 individuals for genocide, war crimes and crimes against humanity between 2004-2008, and recommended that immigration action be taken against approximately 300 individuals. Following these recommendations, 138 adverse immigration decisions were made which included the refusal of entry and leave to remain in the UK, as well as the denial of protection under the Refugee Convention: *Hansard* HC vol 480 col 1066W (14 October 2008) (Mr Woolas); and *Hansard* HC vol 482 col 1345W (13 November 2008) (Mr Woolas).<sup>74</sup> Ss 67A(2)(a)–(d).

<sup>75</sup> See R. Verkaik, 'Britain a "Safe Haven" for War Criminals' *The Independent*, (London, England, 6 April 2010).

<sup>76</sup> *Hansard* HL vol 713 cols 1067–68 (26 October 2009) (Baroness D'Souza). The same point was made by the JCHR, (note 47) para 76, and the Aegis Trust.

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